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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER 1984, TERM

THE ECCLESIASTICAL ORDER
OF THE ISM OF AM, INC., PETITIONER

V.

COMMISSIONER OF INTERNAL REVENUE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOSEPH FALCONE

4000 Town Center
Suite 500
Southfield, MI 48075
(313) 357-0666

ATTORNEY FOR PETITIONER

QUESTIONS PRESENTED

1. Whether it is a violation of the Establishment and Free Exercise Clause of the First Amendment and a denial of equal protection to require religions not organized as "churches" to register under 26 U.S.C. 508 and subject themselves to administrative review to attain tax exempt status, when religions that are organized as "churches" do not have to so register.

2. Whether it is a violation of the Establishment and Free Exercise Clause of the First Amendment and a denial of equal protection/due process for the Internal Revenue Service and the Tax Court to deny tax exempt status to one religious organization while allowing tax exempt status to similarly situated religious organizations engaged in similar activities.

3. Whether the Tax Court in reviewing a ruling by the Internal Revenue Service on the tax exempt status of a religious organization by means of a declaratory judgment action under 26 U.S.C 7428 must review the same administrative record which was used by the Internal Revenue Service when it made its administrative ruling.

4. Whether the denial of tax exempt status to a religious organization can be based upon the content of speech between the members of the religious organization.

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COMMISSIONER OF INTERNAL REVENUE

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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Petitioner, The Ecclesiastical Order of the ISM of AM, Inc., respectfully prays that a Writ of Certiorari issue to review the Judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered on July 31, 1984.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A-1) is not reported. The opinion of the Tax Court (App.B-9) is reported at

80 T.C. 833. The Memorandum Sur Order of the United States Tax Court denying Petitioner's Motion to Supplement the Administrative Record (B-3) was not reported. The Order and Opinion of the United States Tax Court Denying Petitioner's Motion to Vacate or Revise the Decision (B-39), and The Order and Opinion of the United States Tax Court Denying Peitioner's Motion for Reconsideration (B-37) were not reported.

JURISDICTION

The judgment of the Court of Appeals (App. A-1) was entered on July 31, 1984. A Petition for Rehearing was denied on October 15, 1984 (App. A-5). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provisions involved are the First Amendment to the Constitution and the Fifth Amendment to the Constitution which are set forth in Appendix D at page D-20.

Various sections of the Internal Revenue Code are involved: 26 U.S.C. 170(b) (App. D-1); 26 U.S.C. 508 (App. D-4) and 26 U.S.C. 7428 (App. D-7).

Also, sections of the Administrative Procedure Act are involved: 5 U.S.C. 554 (App. D-9); 5 U.S.C. 556 (D-14) and 5 U.S.C. 706 (D-15).

This case also involves Tax Court Rule 210(b)(11), (App. D-17), and Tax Court Rule 217(b), (App. D-18).

STATEMENT

This case involves issues relating to

the establishment of religion by the Internal Revenue Code which discriminates on its face in favor of religions that are organized into churches. The case also involves conduct by the Internal Revenue Service which is violative of the Free Exercise and Establishment Clauses of the First Amendment in its selective automatic granting of tax exempt status only to religious organizations which meet Internal Revenue Service criteria regarding religious beliefs, organization, speech, and membership.

Petitioner is a Deistic religion that follows the teachings of Thomas Paine set forth in the Age of Reason.[1/] As defined by the Encyclopedia Britannica, 15th

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1/ Age of Reason was first published in America by a religious house as a religious book, and was sold in Virginia along with the Bible by Parson Weems, George Washington's friend and biographer. Deism in Eighteenth Century America, Herbert M. Morais, P.H.d (1934), pages 163-64.]

Edition, Volume 5, page 561:

> Deism, as the word is customarily employed, describes an unorthodox religious attitude that found expression among a group of English writers beginning with Edward Herbert ... in the first half of the 17th Century and ending ... in the middle of the 18th Century. In general, however, it refers to what can be called natural religion, the acceptance of a certain body of religious knowledge that is inborn in every person or that can be acquired by the use of reason, as opposed to knowledge acquired through either revelation or the teaching of any church. ... By the end of the 18th Century, Deism had become a dominant religious attitude among intellectual and upper class Americans. Benjamin Franklin, the great sage of the colonies and then of the new republic, summarized in a letter to Ezra Stiles, president of Yale College, a personal creed that almost literally reproduced Herbert's five fundamental beliefs. The first three Presidents of the United States also held Deistic convictions, as amply evidenced in their correspondence.

The book Republication Religion by G. Adolph Koch, Ph.d. (1933), makes it clear that Ethan Allen, Thomas Paine, Benjamin Franklin and Thomas Jefferson could be legitimately considered Deists. It is Petitioners' main goal and purpose to

reestablish Deism in America. Because Deism does not comport with the religious beliefs of more "traditional" religions, and because it does not meet the Internal Revenue Service criteria for what a religion ought to be, the Internal Revenue Service has sought to suppress it.

Further, Petitioner fears that the Internal Revenue Service is attempting to actively suppress its Deistic beliefs for political reasons. As Thomas Paine stated in The Age of Reason:

> But pure and simple Deism does not answer the purpose of despotic governments. They cannot lay hold of religion as an engine, but by mixing it with human inventions, and making their own authority a part; neither does it answer the avarice of priests, but by incorporating themselves and their functions with it, and becoming, like the government, a party in the system. It is this that forms the otherwise mysterious connection of Church and State; the Church humane, and the State tyrannic.
>
> It has been the scheme of the Christian Church, and of all the other invented systems of religion,

> to hold man in ignorance of the Creator, as it is of Governments to hold man in ignorance of his rights. The systems of the one are as false as those of the other, and are calculated for mutual support.

The Age of Reason, Thomas Paine, Citadel Press, (1974), pages 186-87.

As a Deistic religion, Petitioner was not initially organized into a "church" or a structured organization. Thus, it could not be considered automatically tax exempt under 26 U.S.C. 508 and 501(c)(3). Because Petitioner's founder, George N. Baustert, believed that all religions were entitled to tax exempt status under the laws of the United States of America, and knowing of no other way to achieve tax exempt status, he studied other religious organizations, and found that the Universal Life Church of Modesto, California, was exempt from taxation under 26 U.S.C. 501(c)(3), and was recogized as so each year by the Internal Revenue Service by its annual list of tax exempt

organizations, Publication 78.

George N. Baustert, acting in reliance on the fact that the Internal Revenue Service in Publication 78 was permitting the Universal Life Church to operate as a tax exempt organization, purposely copied the organizational structure of the Universal Life Church.

Because the Petitioner may not be considered automatically exempt under 26 U.S.C. 508, Petitioner had to apply to the Internal Revenue Service for exempt status relying on Petitioner's organizational and operational similarity to the Universal Life Church as the reason why it should be granted the exemption.

The Internal Revenue Service, however, denied Petitioner tax exempt status precisely <u>because</u>, Petitioner was similar to the Universal Life Church. The Internal Revenue Service, in its Brief to the Tax Court, presented these proposed

findings of fact:

> 171. The modus operandi of the Ism of AM is based on that used by the Universal Life Church of Modesto, California, with some refinements
>
> 174. Purported distinctions from the modus operandi used by the Universal Life Church of Modesto, California, is that an Ism of Am minister must "truly" believe the doctrine, the creed, the theory and the practice of the Ism of Am which is "guaranteed" by the signing of the I AM U + U Am I vow card.

The Tax Court, though it specifically stated: "After studying materials developed by the Universal, Life Church, Rev. Baustert wrote new literature and instituted several refinements in petitioner's method of operations," totally ignored the fact that the Universal Life Church was tax exempt, and went on to hold that: "Petitioner has not suggested that there exists, and, we submit, cannot find, a single instance in which respondent has granted tax-exempt status to a religious organization that

carried on activities similar to petitioners."

Thus, even though the Petitioner purposely attempted to conform to the method of operation of the Universal Life Church in reliance upon the Internal Revenue Service's support and approval of the Universal Life Church's method of operation, both the Internal Revenue Service and the Tax Court disallowed Petitioner's tax exempt status, based on that very similarity. Petitioner's "misguided" attempt to conform, of course, resulted in the infringment upon the free exercise clause that occurs when the government approves or establishes one religion above others.

Petitioner continued to reiterate on the record in both the Tax Court and the Sixth Circuit Court of appeals that the Universal Life Church, which Petitioner had patterned itself after, and to which

Petitioner had been compared as justification for the denial of Petitioner's tax exempt status, was an IRS recognized tax exempt organization. It was only after Petitioner had filed a Motion for Reconsideration in the Sixth Circuit, however, once again specifically pointing out the inconsistancy of the Internal Revenue Service and the Tax Court basing their denial to Petitioner of its tax exemption on the fact that Petitioner was similar to and was patterned after the Universal Life Church, while the Universal Life Church continued to operate as tax exempt, did the Internal Revenue Service, on August 28, 1984, give the Universal Life Church notice that its tax exemption was being contested. This most mild and preliminary administrative action occured more than three and one half years after petitioner was denied tax exempt status.

This inconsistant treatment has never

been explained by the Internal Revenue Service, nor has the Internal Revenue Service offered any explanation of the years of favored treatment of the Universal Life Church.

Petitioner contends that one of the reasons that the Internal Revenue Service may have wanted the Universal Life Church to to continue its operation as a tax exempt organization (it is still considered a 501(c)(3) organization today), is to put itself in a position to selectively prosecute persons that are attracted to the Universal Life Church membership. See, for example, Universal Life Church, Inc. (Full Circle) v. Commissioner, 83 T.C. 292 (1984); Murphy v. Commissioner, T.C. Memo 1983-59 (1983); Schilberg v. Commissioner, T.C. Memo. 1982-336 (1982);Hall v. Commissioner, T.C. Memo. 1982-337 (1982); Kellman v. Commissioner, T.C. Memo. 1981-615 (1981);

Brown v. Commissioner, T.C. Memo 1980-553 (1980). Certainly both the Internal Revenue Service and the Tax Court were well aware of the Universal Life Church's method of operations. Yet it knowingly permitted that organization to remain tax exempt.

The Internal Revenue Service further refused, with the Tax Court's acquienscence, (App. B-3) to release to the Tax Court the full administrative record upon which the Internal Revenue Service based its decision on. Because the Tax Court based its decision on a different record than used by the Internal Revenue Service, it comes to no surprise that the Tax Court could state in reply to Petitioner's claim of unconstitutional discrimination by the Internal Revenue Service: "Consequently, on the record before us, respondent's denial of petitioner's application for tax exempt

status is far from being constitutionally infirm." (emphasis added).

The Internal Revenue Service also based its denial of Petitioner's tax exemption status on the fact that Petitioner's religious practices did not conform to the "14 criteria" required by the IRS to be met by a religion to be considered a "church". (App. C-9; C-18). Any religious organization that cannot meet the "14 criteria" or does not conform its religious beliefs to these government mandated requirements must subject itself to the administrative procedure and review underlying a application for tax exempt status, and even then is not granted "preferential treatment". See, Ecclesiastical Order of the Ism of Am, Inc. v. Internal Revenue Service, 725 F.2d 398, 403, fn. 1 (6th Cir. 1984).

The IRS refused to consider Petitioner's constitutional objections

initially; the Tax Court refused to consider those establishment, free exercise and due process/equal protection arguments of Petitioner; and the Court of Appeals also refused to address the constitutional issues raised.

Consequently, it appears that only this Court can compel the Internal Revenue Service and the lower courts to address this ongoing establishment of religion and its resulting suppression of new religions. Every day that the discrimination among religions remains embedded in the Internal Revenue Code causes irreparable damage to the most precious of our rights.

REASONS FOR GRANTING THE PETITION

This case presents important questions relating to the establishment of religion by not only the Internal Revenue Code, which blatantly discriminates in

favor of religions that are organized into churches, but also by the Internal Revenue Service's conduct in selectively granting tax exempt status to religious organizations that meet IRS approved religious beliefs, organization, speech, and membership; and its purposeful discrimination, against religious organizations that do not conform to the IRS approved religious tenents by denying those religions tax exempt status. This discrimination, as in this case, is sometimes accomplished by basing administrative rulings on the "secret" portions of the administrative record that are not presented to the Tax Court.

Further, it is apparent that the Tax Court has systematically engaged in a pattern of denying exempt status to new religious organizations that may be organized and operated differently than traditional churches, thus suppressing the

free exercise of religion and, via its application of the 14 IRS criteria, in effect establishing more traditional religions.

1. "CHURCH" TYPE RELIGIONS ARE IMPERMISSIBLY FAVORED OVER OTHER RELIGIONS.

"The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." Larson v. Valente, 456 U.S. 228, 224 (1982). Thus, there should be no laws that "aid one religion" or "prefer one religion over another." Everson v. Board of Education, 330 U.S. 1, 15 (1947). The Court has recoginzed the competition between [religious] sects, Zorach v. Clauson, 343 U.S. 306,314 (1952), and has clearly affirmed the principle that "government ... effect no favoritism among sects ... and that it work deterrence of no religious belief." Abington School District v. Schempp, 374 U.S. 203, 305 (1963). This is especially true when the Government places its financial support

behind certain religious beliefs, causing a suppression in the free exercise of religion by coercing "religious minorities to conform to the prevailing officially approved religion ... ." Engel v. Vitale, 370 U.S. 421, 431 (1962).

Yet there are provisions in the Internal Revenue Code that give preference to religions that have "distinct religious histories," a "literature of their own," a "formal code of doctrine and discipline" and which "require their members to renounce all former religious affiliations." These provisions in the Internal Revenue Code do not treat all religions equally, but distinquish between religions, classifying them into "churches" and "nonchurches". Thus they impermissibly favor and establish the religions that conform to the requirements set forth by the IRS for "churches" which, both on the face of the Internal Revenue

Code sections, and in their actual application, discriminate against the nonchurch religions. This is so, even though "church" is a vague term, which is never defined in the Internal Revenue Code. See, "Church" in the Internal Revenue Code: The Definitional Problems, Whelan, 45 Fordham L. Rev. 885 (1977).

For example, 26 U.S.C. 508 requires all religious organizations, other than churches to apply to the IRS for an exemption ruling in order to achieve status as a tax exempt organization:

> Section 508(c) exempts various organizations, including churches, from the notification requirements of section 508(a). Thus, while most organizations claiming tax-exempt status under section 501(c)(3) must inform the Commissioner of their application for exempt status (employing Form 1023) churches need not make such a notification. Failure to so notify the Commissioner results in disallowance of exempt status for those organizations not within the safe harbor provided by section 508(c). Churches which are within the safe harbor, however, need not notify the Commissioner to retain

their exempt status.

Universal Life Church (Full Circle) v. Commissioner 83 T.C. 292, 297 (1984).

Other Internal Revenue Code Sections that outright favor "churches" are: 26 U.S.C. 170(b)(1)(A)(i) (allowing a greater portion of a taxpayers income to be deducted for contributions to "churches") 26 U.S.C. 511-14 (limiting a "church's" liability for the tax on unrelated business income), 26 U.S.C. 3309 (limiting a "church's" liability for state unemployment taxes), 26 U.S.C. 6033 (specifying that a "church" has no obligation to file annual financial reports), 26 U.S.C. 6043(b)(1) (specifying that a "church" has no obligation to report a liquidation, dissolution, termination, or substantial contraction). See also, 26 U.S.C. 509, 501(h), 410(c) and (d), 411(e)(1)(B), 412(h)(4), and 414(e).

Some Internal Revenue Code Sections not only distinquish between religious organizations that are "churches" or closely connected with "churches" and those religious organizations that have no "church" status or connection, but also within the spectrum of "church" organizations themselves. Those Internal Revenue Code sections contain references to "churches and conventions or associations of churches", but not "integrated auxiliaries" of churches; other sections contain all three types of organizations, and many Internal Revenue Code sections refer explicitly to religious orders as a special category. 26 U.S.C. 1402(a)(8) and (c)(4), 3121(b)(8)(A), (i)(4), (r)(1) and (2), 3309(b)(2) 3401(a)(9), 512(b)(12) and (15), 6033(a)(2)(A)(iii), 170(b)(1)(A)(i), 410(d), 414(e)(1)(A) and (3)(A), 508(c)(1)(A), 512(b)(14), 514(b)(3)(E),

3309(b)(1), 6033(a)(2)(A)(i), 6043(b)(1) and 7605(c), 509(a)(1).

The above mentioned laws are plainly violative of the prohibition against anything other than the "strict neutrality" regarding different religious sects required by the Constitution. The manner in which a religion organizes itself to practice its beliefs is implicitly tied to the actual practice of its religion.

Of course, not only are the Internal Revenue Code Sections impermissibly discriminatory on their face, because they "make ... explicit and deliberate distinctions between different religious organizations ..." Larson v. Valente, 456 U.S. 246 at fn. 23, but in their application do indeed have a " 'disparate impact' upon different religious organizations." Id.

The three "tests" that a statute must

pass in order to avoid the prohibition of the Establishment Clause were set forth in Lemon v. Kurtzman, 403 U.S. 602 at 612-613 (1971):

> First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, ... finally, the statue must not foster "an excessive governmental entanglement with religion."

In the present case, the "Lemon tests", should not even be reached, as those "tests" "are intended to apply to laws affording a uniform benefit to all religions, and not to provisions ... that discriminate among religions." Larson v. Valente, supra., at 252. All of the statutes, however, including the one most directly involved in the present case, 26 U.S.C. 508, do fail each of the "tests":

There is no secular reason to exempt churches from applying for exempt status while requiring other religious

organizations to apply. The same possible secular reasons for having nonchurch religions apply for exemptions, (such as to monitor fund-raising activities, to determine if there has been personal inurement, to determine if organization is, in fact, a "religious" one, to determine if the religion carries on non-exempt activities), would equally apply to "churches."

The second test, which requires that the primary effect of the requirement be neither to advance nor inhibit religion, clearly is violated by a requirement that exempts "church" religions from subjecting themselves to governmental examination. Just the burden of applying would chill the formation of nonchurch religions and promote and, in effect, establish "church" religions.

The statutory distinction between "church" and nonchurch completely fails

the third test of no excessive governmental entanglement with religions. Certainly the benefit conferred by tax exempt status constitutes a substantial advantage, and the burden to comply with the reporting requirment is not de minimis. The Internal Revenue Service has interpreted the law as requiring it to ask the following questions:

> "Describe a typical religious service conducted by your Church. Provide us with a list showing the date of each service you have conducted since your inception and the number of persons in attendance at each service." and
>
> "May an individual who is a member of another religion become a member of your Church? If so, on what basis? Is renunciation of former religious beliefs a pre-requisite to membership in your church?"

[These questions and others, equally offensive were put to Petitioner during the investigative stage of the Internal Revenue Service's administrative review, and the denial of Petitioner's tax exempt

status was based on the answers to those questions.]

There is no compelling governmental interest that could possibly be served by the asking of these questions, yet, even more disturbing, since at least 1978, the Internal Revenue Service has been preferring certain religions over others by the grant of exemptions and the waiver of reporting and registration requirements on the following criteria:

1. A distinct legal existence.
2. A recognized creed and form of worship.
3. A definite and distinct ecclesiastical government.
4. A formal code of doctrine and discipline.
5. A distinct religious history.
6. A membership not associated with any other church or denomination.
7. An organization of ordained ministers.

8. Ordained ministers selected after completing prescribed services.

9. A literature of its own.

10. Established places of worship.

11. Regular congregations.

12. Regular religious services.

13. Sunday schools for religious instruction of the young.

14. Schools for the preparation of its ministers.

This is clearly the "state inspection and evaluation of the religious content of a religious organization [that is] fraught with the sort of entanglement that the Constitution forbids. It is a relationship pregnant with dangers of excessive government direction ... ." Lemon v. Kurtzman, supra., at 620.

Certainly the grant of benefits by the Government, based on the necessary satisfaction of the above requirements, or the giving of the "correct" answers to the above questions, would amount to the

impermissible conferring of the "imprimatur of State approval on religious sects or practices." Widmar v. Vincent, 454 U.S. 263, 274 (1981). See also, Ideal Life Church of Lake Elmo v. County of Washington, 304 N.W. 2d 308, 317-20 (S. Ct. Minn. 1981); Holy Spirit Association for Unification of World Christianity v. Tax Commissioner of City of New York, 435 N.E. 2d 662, 663 (1982).

2. THE INTERNAL REVENUE SERVICE HAS PREFERRED SIMILARLY SITUATED RELIGIONS OVER PETITIONER.

The Tax Court itself in the instant case, has made it clear that tax exempt status under 26 U.S.C. 501(c)(3) cannot be withheld from one religion if another religion of the same class is enjoying that benefit:

> Nevertheless, unconstitutional discrimination might well arise if benefits granted to one religious group are denied to others of essentially the same class. (App.B-32)

The Tax Court allegedly based its decision that Petitioner was not tax exempt on the fact that Petitioner did not operate exclusively for exempt purposes. The activity that Petitioner engaged in that the Tax Court and the Court of Appeals held caused the denial of tax exempt status, was the "counseling [of] individuals, for specific "donations," on the purported tax benefits available to

ministers of the Ism of Am under the Internal Revenue Code." (App. B-24) Because the "counseling" was limited to Petitioner's ministers, the Court held that the Petitioner served private, rather than public purposes. (As explained more fully in section 4 of this Petition, the Tax Court seemed more concerned over the content of the "counseling" rather than the activity of "counseling" itself.)

First, and foremost, during the entire time that Petitioner was engaged in the administrative procedure, the Tax Court litigation, and the Sixth Circuit appeal, much more agressive tax counseling was carried on by the Universal Life Church. Yet the Internal Revenue Service never even raised its administrative eyebrows over those activities.

Presented to the Tax Court, and attached to the Briefs filed with the Court of Appeals for the Sixth Circuit

were numerous examples of tax counseling being engaged in by the Universal Life Church. For example, the Universal Life Church not only actually blatantly sells tax advice, but its advice goes so far as actually setting out verbatim the answers to each question by the Internal Revenue Service. Further, the Universal Life Church sells courses entitled "Tax Planning I, Tax Planning II and Tax Planning III." The Universal Life Church sells "canned" freedom of information requests packets, and ULC Tax Audit Seminars, Parts, I, II and III in which a member is instructed in step by step procedures how to handle a tax audit as it relates to ULC ministers, congregations and membership donations.

Thus, even if tax "counseling" could be considered as prohibiting tax exempt status, the Courts below and the Internal Revenue Service should still be called

upon to address the constitutional issue of whether tax exempt status can be denied to a religion that engages in the same or similar activity that has not caused the disallowance of tax exempt status to other organizations.

The Tax Court, however, faced with the fact that almost every religious organization engages in some sort of tax advice to its members, ("We are not holding today that any group which discusses the tax consequences of donations to and/or expenditures of its organizations is in danger of losing or not acquiring tax-exempt status" (App. B-34)), tried to limit its holding by stating that it was really only complaining about the amount of tax advice that was given by Petitioner: "Our holding today goes only to those organizations whose entire existence is permeated with the purpose of counseling taxpayers on tax

matters".(App. B-34).

The manifest danger with the Tax Court's belief that it can base the grant or denial of tax exempt status on the "amount" of tax advice activity is clearly shown in the instant case, where the Court critizes Petitioner for not having more religious writings in comparision to administrative writings. (Tax Court Opinion at Footnote 12. (App. B-26)).

In the instant case, as seen in section 3 below, Petitioner had previously advised the Internal Revenue Service of the various religious writings that it relied on, but the Internal Revenue Service would not release that part of the administrative record.

Because the Tax Court counted the words that discussed taxes, it impermissibly concentrated on the "activity" of giving tax advice, rather than the "purpose" behind that activity.

The statute itself states that it is the purpose, and not the activity, which must be exclusively religious. 26 U.S.C. 501(c)(3).

Thus, in determining whether an organization is operated exclusively for religious purposes, the objective nature of the organizations's activities is not dispositve. As the Tax Court itself noted in B.S.W. Group, Inc. v. Commissioner, 70 T.C. 352 (1978), "the purpose towards which an organization's activities are directed, and not the nature of the activities themselves, is ultimately dispositive of the organization's right ot be classified as a section 501 (c)(3) organization." Id. at 356-57.

Thus, the Tax Court has allowed a church to operate several businesses, including a laundry, a hotel, a nursery, a ranch and a sawmill and still be tax exempt. Golden Rule Church Association v.

Commissioner, 41 T.C. 719 (1964). The business activity was allowed because it was claimed to demonstrate to the world that the Church's teachings applied to daily business life. Id., at 721, 723-24.

The purpose behind Petitioner's giving tax advice to its members was to assist them in dealing with the complicated rules and regulations that the Internal Revenue Service has promulgated for non-traditional religions. Petitioner was duly concerned that the Internal Revenue Service would seek to harass its members by finding technical violations in the operation of their individual congregations.

Petitioner believed that in order to survive, it had to establish a good base of well educated ministers. The Tax Court second guessed Petitioner, and in effect is now telling other new religions that they have to meet the proper "mix" of tax

advice and religious writings, or lose their exemption. Such a ruling contradicts the very basis of the Bill of Rights set forth in the Constitution of the United States of America. Indeed, it violates the very spirit and intent of why this country declared its independence from England.

The Tax Court also equated the education of Petitioners ministers with violating the prohibition against serving private, as opposed to public, purposes. Despite the fact that a tax exempt religion is not permitted to serve private purposes, the Internal Revenue Service routinely grants tax exemptions to various monasteries, convents and religious orders, most of which are Roman Catholic, and are covered by the annual group exemption letter the Internal Revenue Service issues to the United States Catholic Conference. Additionally, in a

series of private letter rulings, the Service confirmed the tax-exempt status of eleven Cistercian monasteries. Private Letter Rulings Nos. 7838028-7838036 (June 21, 1978). One of the rulings notes that "[a]s long as [a] monk remains in [the] monastery ... he [will receive] food, shelter, clothing and medical care [for life]. Private Letter Ruling No. 7838028 (June 21, 1978).

Further, the Internal Revenue Service has determined that the public interest requirement can be met by serving the interest of the individual members of religious organizations. See Rev. Rul. 73-285, 1973-2 C.B. 174 (public interest served by organization providing funds to defend legal suits against sect members prosecuted for violations caused by religious practice), Rev. Rul. 56-403, 1956-2 C.B. 307 (foundation awarding scholarships to select fraternity served

public interest.).

If 26 U.S.C. 501(c)(3) is interpreted to require an organization to do more than serve the needs of its immediate membership, such a requirement would be a violation both of the Free Exercise and the Establishment Clause not only by coercing a particular form of religious expression, See Torcaso v. Watkins, 367 U.S. 488, 495 n.11 (1961), but also by discriminating between religions on the basis of whether their doctrines coincide with the IRS's concept of a contribution to the public interest. See Universal Life Church, Inc., v. United States, 372 F. Supp 770 , 776 (E.D. Cal. 1974).

3. THE TAX COURT DID NOT REVIEW THE SAME ADMINISTRATIVE RECORD AS USED BY THE INTERNAL REVENUE SERVICE TO MAKE ITS ADMINISTRATIVE DECISION.

26 U.S.C. 7428 permits the Tax Court and District Courts to review the determination of the Internal Revenue Service on the exempt status of non-profit organizations, including religious organizations.

During the Tax Court proceedings below, it became clear that the Internal Revenue Service based its administrative determination on a different administrative record than was used by the Tax Court to make its decision. The administrative record used by the Internal Revenue Service contained certain materials, including notes taken at conferences in Washington, D.C., that were not contained in the record reviewed by the Tax Court. Specifically lacking in the

Tax Court's version of the Administrative Record were the discussions between Petitioner and the Internal Revenue Service during administrative conferences in Washington, D.C., regarding the similarity between Petitioner and the tax exempt Universal Life Church. The Internal Revenue Service had promised to record the administrative proceedings, and did in fact do so, by the notekeeping of its officers in charge of the hearing. Those notes, though used in the Internal Revenue Service's administrative determination, were not transmitted to the Tax Court for its consideration during the Declaratory Judgment action under 26 U.S.C. 7428. Thus, the Tax Court did not review the same administrative record used by the Internal Revenue Service.

The void in the Administrative record created by the Internal Revenue Service is important because the Tax Court based its

decision on the incorrect finding that Petitioner never claimed that it had been patterned after the Universal Life Church, which is tax exempt:

> Petitioner has not suggested that there exists, and, we submit, cannot find, a single instance in which respondent has granted tax-exempt status to a religious organization that carried on activities similar to petitioner's. Consequently, on the record before us, respondent's denial of petitioner's application for tax exempt status is far from being constitutionally infirm. (App. B-33)

There are presented two issues of administrative law that must be decided:

First, must the Tax Court in a declaratory judgment action under 26 U.S.C. 7428 review and base its decision on the same identical record as used by the Internal Revenue Service when it made its administrative decision.

Second, does the Administrative Procedure Act apply to the adjudicatory administrative proceedings and hearings conducted by the IRS while making its

decision on the tax exempt status of an organization.

The Tax Court rules provide that during a hearing conducted pursuant to 26 U.S.C. 7428, it cannot look any further than the "Administrative Record" as defined by Tax Court Rule 210(b)(11). That rule states that only records actually submitted to the Internal Revenue Service by the taxpayer may be considered the "Adminstrative Records." What was intended by the Tax Court by adopting the Rule was:

> it is essential that such record contain all the material upon which the Commissioner based his determination. Prefatory Note 64 TC 1177 at 1179.

Both houses of Congress upon enacting 26 U.S.C. 7428, approved of and made direct reference to the Tax Court's previous requirement in declaratory judgment actions that the same record used by the Internal Revenue Service be reviewed by the Tax Court. See S. Rep.

No. 938, 94th Cong., 2d Sess. (1976) at Footnote 7, and H.R. Rep. No. 658, 94th Cong., 1st Sess. (1975) at Footnote 7.

Justice Cardozo emphasized the importance that both records be identical when he stated in Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U.S. 292, 303 (1937):

> [H]ow was it possible for the Appellate Court to review the law and the facts and intelligently decide that the findings of the Commission were supported by the evidence when the evidence that it approved was unknown and unknowable?

Besides the obvious reasons for a reviewing court to have the same administrative record before it as that used by the administrative agency in making a decision, in a proceeding conducted pursuant to 26 U.S.C. 7428, the evidentiary facts and representations contained in the administrative record are assumed to be true for the purposes of the proceeding. People of God Community v.

Commissioner, 75 T.C. 127, 128 (1980). Tax Court Rule 217(b)(1). Thus, an allegation by the Petitioner in the instant case that its activities were identical to the activities of a tax exempt organization would have had to be taken as true.

The IRS, of course, contends that it had no responsibilty to provide for a transcript, or had any duty to provide the records it kept during the administrative hearings, despite the fact that this contention is in direct conflict with the requirements of the Administrative Procedure Act. 5 USC 554 provides that if the administrative adjudication is required to be determined "on the record" after an opportunity for an agency hearing, then the Administrative Agency should hold a hearing that meets the requirements of 5 USC 556. At the least, there should have been some clear

provision for the recording of evidence and a from the agency that was based on the evidence. The present procedure that the Internal Revenue Service uses in 26 U.S.C. 7428 administrative proceedings, is to hold a hearing in Washington, D.C., accept oral testimony from taxpayers, record that oral testimony in note form, base its decision on those notes, then refuse to transmit them to the Tax Court. The Tax Court then refuses to compel the transmittal of those notes, because the it claims that its administrative record is limited to the materials that the taxpayer submits. (App.B-5 - 7). Thus, the Tax Court understands that it must be reviewing an incomplete record each time it decides a 26 U.S.C. 7428 action.

If the Internal Revenue Service procedures were subjected to the Administrative Procedure Act, a record would have to be kept of the

administrative hearing. In United States v. Allegheny-Ludlum Steel Corp., 406 U.S. 742, 757 (1972), the Court held that it was not necessary that the statute referring to the type of hearing contain the "precise words 'on the record'" to make sections 556 and 557 applicable. Further, the case of United States v. Florida East Coast R. Co., 410 U.S. 224, 245 distinquished between what type of proceeding was required by the Administrative Procedure Act, when there was adminstrative rulemaking, compared to the type of adjudicatory type of hearing that was present in the instant case.

Thus, it is clear that the administrative proceedings envisioned by Congress under 26 U.S.,C. 7428 were "adjudicatory" type proceedings that were to be reviewed on the record. The proceedings held by the Internal Revenue Service in the instant case (and in all

cases of this type) do not the meet the requirements of 5 U.S.C. 556 because the Internal Revenue Service fails at minimum, to keep a record of the proceedings before it and to submit that record to the reviewing Court. For the Tax Court to properly review a proceeding under 26 USC 7428, it must know "what factors or data were in fact considered by the [IRS]." U.S. Lines v. Federal Maritime Commission, 584 F.2d 519 (D.C. Cir. 1978).

The Tax Court has recently addressed the issue of whether the Adminstrative Procedure Act applies to a proceeding under 26 U.S.C. 7428 in Universal Life Church (Full Circle) v. Commissioner, 83 T.C. 292 (1984). Although in that case the Court did not base its holding on that issue, it refuted the Internal Revenue Service's argument that the Administrative Procedure Act did not apply to it by stating that such proceedings were not de

novo. 83 T.C. 292, 300 at Footnote 19.

4. PETITIONER WAS DENIED ITS TAX EXEMPTION BECAUSE OF THE CONTENT OF ITS SPEECH.

It is clear from the Tax Court's opinion in the instant case that Petitioner was being punished for the content of its speech. The Tax Court was more concerned that the tax advice given by Petitioner was "incorrect" than by the fact that it was actually given. For example, in Footnote 12 of the Tax Court's opinion, the Tax Court stated: Petitioner's "instructions" focus on maximum tax benefits; no consideration is given to the "reasonableness" limitation."

Additionally, the Tax Court complained that Petitioner's advice to its members that:

> "a religious organization's disbursements to its ministers, regardless of amount, cannot be successfully challenged by [the IRS] has been repeatedly rejected."

The Tax Court attempted to cloak its

censorship by stating that there is a difference between informing members about tax benefits, and suggesting "innumerable" methods by which tax benefits could be maximized. Thus, the Tax Court implicitly indicated that if the content of Petitioner's speech had been different, if it had complied with the IRS's "approved" version, if it had given the IRS's version of the tax laws equal time, then Petitioner would have received its tax exempt status.

What the Tax Court has done, by reviewing Petitioner's speech for content, is to foster "entanglement" by ruling on the "correctness" of the content of the communication between Petitioner and the members of its religion. The situation of the Tax Court in the present case is similar to the one expressly forbidden by this Court in Widmar v. Vincent, 454 U.S. 263 (1981). In that case, this Court

warned a University against taking it upon itself to distinquish between "religious worship" and "religious speech." This Court stated: "This alone could prove 'an impossible task in an age where many and various beliefs meet the constitutional definition of religion.'" Id. at Footnote 11, citing O'Hair v. Andrus, 613 F.2d 931 (D.C. Cir. 1979).

In fact, it is clear from the opinion that the Tax Court confused Petitioner's religious statements with what the Tax Court believed was tax advice. The Court, in Footnote 13, of its opinion, (App. B-27) pointed out:

> We recognize that some of petitioner's literature is relatively devoid of the tax avoidance message. For example, both "The Book of Am - The Enlightenment" and the pamphlet "The Proof of AM" mention taxes only once, in a sentence which states that, "[m]oreover, beyond the possession of such power over others, the church is materially the richest corporation in the world and for the most part pays no taxes." However, the rest of petitioner's literature contains so many suggestions and

> recommendations regarding maximizing tax benefits that one cannot but conclude that a substantial nonexempt purpose permeates the literature taken as a whole.

The above statement, contained in Petitioner's writings, is an important part of Petitioner's Deistic religious belief that it is morally wrong for religions organizations to acquire wealth, and such wrong is further compounded by the fact that most organized religions are being supported in their acquisition of such wealth by the Government through tax exemptions.

The Tax Court, however, interpreted these religious messages as a "tax avoidance message." This misunderstanding by the Tax Court underscores the reason our founding fathers wanted to separate the church and the state in the first place.

For example, how would the Tax Court, in picking through the writings of the

Catholic Bible, interpret the following writing, from Mark, Chapter 12:

> They next sent some Pharisees and Herodians after him to catch him in his speech. The two groups came and said to him: "Teacher, we know you are a truthful man, unconcerned about anyone's opinion. It is evident you do not act out of human respect but teach God's way of life sincerely. Is it lawful to pay the tax to the emperor or not? Are we to pay or not to pay?" Knowing their hypocrisy he said to them, "Why are you trying to trip me up? Bring me a coin and let me see it." When they brought one, he said to them, "Whose head is this and whose inscription is it?" "Caesar's," they told him. At that Jesus said to them, "Give to Caesar what is Caesar's, but give to God what is God's." Their amazement at him knew no bounds.

The New American Bible, Catholic Book Publishing Co. (1970).

Because Jesus was talking about the subject of taxes, does that give the Tax Court even the right to review the writings and decide if Jesus's words had a religious content or a "tax advoidance" content? One would hope not.

But, pursuant to the Tax Court's

opinion there now exists a vague content requirement for religious writings that is "so unclear as to afford latitude for subjective application by IRS officials." Big Mama Rag, Inc. v. United States, 631 F. 2d 1030, 1034 fn. 78 (D.C. Cir. 1980). Such vague requirements or rules must be struck down when they:

> require [those subject to them] to "steer far wider of the unlawful zone," than if the boundaries of the forbidden areas were clearly marked, ... by restricting their conduct to that which is unquestionably safe. Free speech may not be so inhibited. Baggett v. Bullitt, 377 U.S. 360, 372 (1964).

Further, the Tax Court seems to be applying a "test" based on the number of of "religious" words contained in a religion's writings, as compared to "administrative" words. Such a test cannot but favor older, traditional religions, with greater religious works. Further, such a test will favor religions that perhaps have more complicated

beliefs, or require more explanation. Also, religions would have to incorporate into the administrative record, and therefore turn over to the Internal Revenue Service for its review, all of their religious writings in order to attempt to meet some nebulous "weight" test.

Not only do the Internal Revenue Service and the Courts have no legitimate interest in perusing through anyone's religious writings, but such writings, or the extent thereof, should have no bearing on whether a religion is determined to be tax exempt. It is clearly violative of the Free exercise clause and the Establishment clause to have any requirement that religious beliefs be put down in writing, much less proscribe the extent of such beliefs.

Perhaps this is why the Tax Court usually never rules in favor of new

religions when deciding whether an exemption under 26 U.S.C. 501(c)(3) should be granted. Basic Bible Church of America v. Commissioner, T.C. Memo 1983-287 (1983); Parshall Christian Order v. Commissioner, T.C. Memo 1983-11 (1983); New Life Tabernacle v. Commissioner, T.C. Memo 1982-367 (1982); Truth Tabernacle v. Commissioner, T.C. Memo 1981-214 (1981); Universal Life Church Inc., (Full Circle) v. Commissioner, 83 T.C. 292 (1984), National Association of American Churches v. Commissioner, 82 T.C. 18 (1984); Church of Transfiguring Spirit, Inc., v. Commissioner, 76 T.C. 1 (1981); Schoger Foundation v. Commissioner, 76 T.C. 380 (1981). But see, Alive Fellowship of Harmonious Living, T.C. Memo 1984-87 (1984).

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

JOSEPH FALCONE